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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

EDWARD G. SANCHEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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APPELLEE'S BRIEF

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APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL FACTS

Edward Sanchez appeals from his conviction on Counts 1 and 2 of a three-count indictment charging him with violations of Title 21, United States Code, Section 174 (sale and concealment of narcotics). Co-defendant Carlos Garcia's conviction on Count 3 of the same indictment was affirmed by this Court in 1968.

Count One charges appellant with knowingly and unlawfully receiving, concealing and facilitating the concealment and transportation of 1.880 grams of heroin, a narcotic drug, which he knew previously had been imported into the United States of America contrary to law. Count Two charges appellant with knowingly and



unlawfully selling and facilitating the same heroin [C. T. 2]. 1/

The indictment was filed on January 28, 1966 [C. T. 2].

Appellant and co-defendant Garcia waived a jury trial on January 31, 1966 [C. T. 5], and on February 3, 1966, trial commenced without a jury before the Honorable Roger D. Foley, United States District Judge [R. T. 2]. 2/

On February 4, 1966, appellant was found guilty on Counts One and Two of the indictment as charged. Thereafter, on April 1, 1966, Judge Foley sentenced appellant to five years on each count to run concurrently, and recommended that he be incarcerated in a hospital-type institution where he may be treated [C. T. 14].

The United States District Court for the Southern District of California had jurisdiction of this case under Title 21, United States Code, Section 3231. The jurisdiction of this Court is based upon Title 28, United States Code, Sections 1291 and 1294.

## II

### STATUTE INVOLVED

Title 21, United States Code, Section 174 provides:

"Whoever . . . receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of any such narcotic drug

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1/ "C. T." refers to Clerk's Transcript.

2/ "R. T." refers to Reporter's Transcript.



after being imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000. . . .

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

### III

#### STATEMENT OF THE CASE

##### A. Questions Presented:

1. Was the evidence sufficient to support a jury finding that defendant knew the narcotics were unlawfully imported?
2. Is the presumption set forth in Title 21, United States Code, Section 174 constitutional?
3. Was defendant denied the assistance of competent counsel?

##### B. Statement of Facts:

Agent Chris Saiz of the Federal Bureau of Narcotics met appellant Sanchez on December 8, 1965, as Saiz was buying



narcotics [R. T. 3]. Sanchez then told Saiz to call him regarding future purchases [R. T. 3]. On December 9, 1965, Saiz called Sanchez and told Sanchez he wanted to buy heroin [R. T. 3-4]. Sanchez said he would have the heroin on December 10, 1965, and directed Saiz to come to Sanchez's house to make the purchase on that date [R. T. 4]. On December 10, 1965, at 12:30 P. M., Saiz again conversed with Sanchez by telephone [R. T. 4, 5]. At about 1:15 P. M., Saiz met Sanchez at the corner of Laverne and Fourth Streets, Los Angeles, as had been arranged previously [R. T. 7-8]. At this meeting, Saiz and Sanchez talked about the delivery of the heroin [R. T. 8-9]. After several telephone calls were placed by Sanchez, Saiz and Sanchez returned to Sanchez's residence [R. T. 10]. Saiz left the area and returned at 3:00 P. M., at which time Sanchez entered Saiz's vehicle [R. T. 11-12]. Eventually, Sanchez met with co-defendant Garcia on the street while Agent Saiz remained in the Government vehicle [R. T. 20]. After he and Garcia had walked out-of-sight for a few minutes, Sanchez returned alone to Saiz's vehicle and told Saiz the heroin wasn't ready [R. T. 21].

Saiz then drove Sanchez back to Sanchez's house [R. T. 22]. Later, Saiz returned and picked up Sanchez [R. T. 27]. Sanchez then told Saiz the heroin was ready and asked Saiz for \$100 for the one-half ounce of heroin Saiz was to buy [R. T. 28]. Saiz gave Sanchez the \$100.00 [R. T. 28]. Sanchez then left the vehicle, walked out of Saiz's view, and returned to tell Saiz that he had given the money to Sanchez's associate [R. T. 28]. As directed by Sanchez, Saiz then drove to the intersection of Michigan and Marianna Streets





in Los Angeles [R. T. 28]. A few minutes later, Sanchez returned to the automobile, displayed two rubber condoms, and stated that he had "scored" [R. T. 29]. Sanchez refused to give Saiz the heroin, saying that he (Sanchez) would deliver it after Saiz joined Sanchez in injecting a portion of it [R. T. 29]. Shortly thereafter, Sanchez was arrested in the vehicle [R. T. 30-31].

#### IV

#### ARGUMENT

- A. THE EVIDENCE IS SUFFICIENT TO SUPPORT THE JURY'S FINDING THAT DEFENDANT KNEW THE NARCOTICS WERE ILLEGALLY IMPORTED.
- 

At the trial, substantial evidence that defendant had actual possession of the narcotics was introduced [R. T. 2-3, 30]. From this fact, the jury could have presumed that defendant knew the narcotic had been imported unlawfully. 18 U. S. C. §174. It is conceded that Sanchez made no attempt to explain his possession of the narcotics to the jury [AOB 4]. <sup>3/</sup>

- B. THE PRESUMPTION CREATED BY TITLE 18, UNITED STATES CODE, SECTION 174 IS CONSTITUTIONAL.
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This and other courts repeatedly have held there is no merit in the contention that the presumption is unconstitutional.



Yee Hem v. United States, 268 U. S. 178 (1925);

Brown v. United States, 370 F.2d 874

(9th Cir. 1966), cert. denied,

386 U. S. 1039 (1966);

Ramirez v. United States, 350 F.2d 306

(9th Cir. 1965);

Bradford v. United States, 271 F.2d 58

(9th Cir. 1959).

C. APPELLANT WAS NOT DEPRIVED OF  
THE ASSISTANCE OF COMPETENT  
COUNSEL.

---

"A conviction may not be set aside on the ground of ineffective assistance of counsel unless trial counsel is so incompetent or inefficient as to make the trial a farce or a mockery of justice. "

Dickinson v. United States, 366 F.2d 183, 185

(9th Cir. 1966);

Accord, Grove v. Wilson, 368 F.2d 414

(9th Cir. 1966);

Thomas v. United States, 363 F.2d 849

(9th Cir. 1966).

The most competent and effective counsel cannot offer evidence which does not exist, and not a shred of evidence is in the record to indicate that defense counsel could have established that appellant had no knowledge that the heroin was unlawfully



imported. As appellant concedes, counsel could not manufacture evidence, nor could he produce harmful or perjured testimony [AOB 7]. It cannot be assumed from the silent record before this Court that defense counsel had at his disposal affirmative exculpat- ing evidence which could have been introduced at trial. See Dalrym- ple v. Wilson, supra.

Moreover, the Reporter's Transcript of the trial clearly reveals that defense counsel was not so ineffective as to make the trial a mockery and a farce. In this regard, it is significant that the trial judge commended defense counsel for his "fine defense" of appellant [R. T. 301-1].

It would be entirely inappropriate for this Court to hold that trial counsel was so ineffective as to make appellant's trial a farce, simply because counsel failed to produce evidence, when nothing in the record indicates that such evidence was available.



CONCLUSION

For the foregoing reasons, appellant's conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Craig B. Jorgensen  
CRAIG B. JORGENSEN

